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INTERNATIONALIZATION OF THE RULE OF LAW?: LEGALIZATION MEETS INSTITUTIONAL INTERACTION

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Abstract:

This paper studies institutional interaction through dispute settlement in international trade governance. Precisely, the paper addresses the question, how and with which consequences the dispute settlement mechanisms of the European Union (EU) and the World Trade Organization (WTO) as well as the dispute settlement mechanisms of the North American Free Trade Agreement (NAFTA) and the World Trade Organization (WTO) influence the normative development or effectiveness of the respectively other institution. Thereby, the paper proceeds in the following steps: First, legalization and institutional interaction will be highlighted as important topics of study. Afterwards, a theoretical framework to analyze institutional interaction through dispute settlement by causal mechanisms will be developed. Eventually, the empirical part of the paper analyzes two important trade-disputes regarding their inter-institutional influence: The *Banana Dispute*, which was arbitrated by the European Court of Justice as well as the WTO Dispute Settlement Body and the *Softwood Lumber Dispute*, which was arbitrated in front of the NAFTA dispute settlement mechanism and the WTO DSB. The paper concludes by drawing the implications of institutional interaction through dispute settlement for the legalization of international trade governance and especially for the already claimed ‘internationalization of the rule of law’ in international trade governance.

1. Introduction

Cooperation in international institutions is contemporary characterized by two different, albeit not independent phenomena: On the one hand, international institutions are increasingly legalized (Abbott et al.: 2000; Zangl/ Zürn 2004; Zangl 2006). On the other hand, international institutions interact with one another, even if they are primarily concerned with the solution of their specific cooperation problems (Alter/ Meunier 2009; Knodt 2007; Raustiala/ Victor 2004). By analysing institutional interaction through dispute settlement in international trade governance, this paper seeks to systematically connect the so far separate investigations of these phenomena and to explore the consequences of institutional interaction for the legalization of international institutions. Precisely, the paper addresses the question, how and with which consequences the dispute settlement mechanisms of the European Union (EU) and the World Trade Organization (WTO) as well as the dispute settlement mechanisms of the North American Free Trade Agreement (NAFTA) and the World Trade Organization (WTO) influence the normative development or effectiveness of the respectively other institution.

The phenomenon of legalization is understood as the decision to impose international legal constraints on governments by giving the procedures of formulation, interpretation, and enforcement of rules an increasingly legal nature. The establishment of courts and court-like bodies within international institutions represents a key dimension of legalization (Keohane et al. 2000: 457) that is called judicialization. It can be claimed to be the most obvious form of legalization (Zangl/ Zürn 2004: 23). Legalization and judicialization can be observed especially pronounced in international trade governance. The EU as well as the WTO show considerable levels of legalization (Goldstein et al. 2000) and even the apparently purely intergovernmental NAFTA exhibits features of legalization (Abbott 2000; Krapohl/ Dinkel/ Faude 2009).

The empirical analysis of legalization by political scientists has been dominated by studies that analyze the legalization of single international institutions, understood as an entity that exists in isolation from other international institutions (cf. Abbott et al. 2000; Stone Sweet 1997; Zangl 2009). This can be attributed to the fact that

international institutions in general have been analyzed for decades as separate entities that are established by interested actors to implement common interests of cooperation in a delimited issue area and exist in isolation from each other (cf. Rittberger 1993; Victor/ Raustiala/ Skolnikoff 1998; Miles et al. 2002). Therefore, the consequences that arise out of the legalization of one institution for the normative development and effectiveness of other institutions and the implications of these interaction effects for the legalization of the respective issue area of international relations (e.g. international trade governance, international environmental governance) have not been analyzed until now.

The analytical view on the legalization of single international institutions led scholars to rather positive evaluations of the effects legalization exerts on governance in and through international institutions (Zangl 2005 – in particular concerning international trade governance). Based on empirical investigations of the effects, the dispute settlement mechanism of the WTO exerts on the behaviour of the U.S. compared to the effects of the old GATT-dispute settlement mechanism on U.S. behaviour, it was concluded that – due to an increasingly regular behaviour of the U.S. - we can observe an “internationalization of the rule of law” – at least in international trade governance in the OECD-world (Zangl 2006; Zangl 2009). It is evident that this appreciation does not pay attention to the effects that emerge out of the interaction of different legal orders and their dispute settlement mechanisms. This is my purpose.

The paper argues that to justifiably speak of the internationalization of the rule of law in international trade governance, it is not sufficient to study the effects dispute settlement mechanisms exert on the behaviour of (powerful) state-actors. While obviously being important, these effects are a necessary, but not a sufficient condition for the internationalization of the rule of law. Due to the fact that it is the basic task of jurisdiction to come to binding decisions and to establish legal peace through dispute settlement in order to secure the rule-of-law, at least two other conditions have to be fulfilled to justifiably speak of the internationalization of the rule of law: Firstly, it has to be warranted that the dispute settlement mechanisms of international institutions in the same policy field do not contradict each others' rulings when dealing with the same questions. Secondly, it has to be prevented that a dispute settlement mechanism adjudges itself a ruling-competence that contradicts

that of another dispute settlement mechanism. Even the fulfilment of these conditions does not imply that the rule of law is truly internationalized, but they constitute necessary conditions that were not addressed by political scientists until now.

If one dispute settlement mechanism contradicts the rulings of another and thereby undermines its authority in a delimited area or if it adjudges itself a ruling-competence that contradicts with that of another dispute settlement mechanism, a competition between dispute settlement mechanisms may emerge that runs counter to the judicial desire of concluding, binding and generally accepted decisions. Thus, the strength of validity of international law can be challenged and destabilised, leading to consequences that are detrimental to the internationalization of the rule of law. These consequences imply in its worst shape that jurisdiction, at least with regard to special questions that produce contradictory judgements, cannot fulfil its basic task to create legal peace. On the other hand, if dispute settlement mechanisms of different international institutions pay attention to each others' rulings and if we can observe a consistent and coherent jurisprudence, another necessary condition for the 'internationalization of the rule of law', albeit not the internationalization itself, is fulfilled.

The paper is structured as follows: First, legalization and institutional interaction will be highlighted as important topics of study in current research on international relations. Especially, the surplus of systematically connecting these two branches of research will be explored. Afterwards, a theoretical framework to analyze institutional interaction through dispute settlement by causal mechanisms will be developed. Eventually, the empirical part of the paper analyzes two important disputes: The *Banana Dispute*, which was arbitrated by the European Court of Justice (ECJ) as well as the WTO Dispute Settlement Body (DSB) and the *Softwood Lumber Dispute*, which was arbitrated in front of the NAFTA-dispute settlement mechanism (NAFTA DSM) and the WTO DSB. The paper concludes by drawing the implications of institutional interaction through dispute settlement for the legalization of international trade governance.

2. Legalization and Institutional Interaction as Important Topics of Study

International relations are in a process of proceeding legalization, understood as a particular and distinctive form of institutionalization. Consequentially, institutional rules govern more of the behaviour of important actors in their issue area (Goldstein et al. 2000: 387). The most obvious form of legalization is the establishment of courts or court-like bodies to settle disputes between the contracting parties in a lawful manner (Zürn/ Zangl 2004: 23). To an increasing degree, within international institutions international courts and in the broader sense quasi-judicial authorities not only emerge, but also confer momentum on law. This momentum, created through continuous decision practice, can be distinguished from the classic logic of cooperation that rests on power resources and interests of powerful actors. It rests on the premise that applying a norm through jurisdiction usually does not only constitute law-application, but also creation and advancement of law. The hence resulting legalization of international cooperation triggered by an international institution and especially its dispute settlement mechanism affects compliance with international obligations, especially the willingness of the concerned states to comply also with displeasing commitments (Stone Sweet 1997; Zangl 2006).

Nevertheless, the legalization of international cooperation triggered by one institution may also interact in a synergistic or disruptive manner with the legalization triggered by other international institutions, which in turn becomes relevant for the normative development and effectiveness of both. While the phenomenon of conflicting legal orders and conflicting arbitrations is already discussed in jurisprudence, mostly under the catchphrase “fragmentation of international law” (cf. Fischer-Lescano/ Teubner 2006; von Bogdandy/ Makatsch 2000; Petersmann 2004; Sauer 2008; Shany 2003) and by those working at the intersection of law and political science (Slaughter 2004), political scientists themselves so far paid no attention to this topic of study.

Because of differing rationalities of international regimes, authors standing in the tradition of Niklas Luhmann’s system-theoretic approach are speaking of the unavoidable ‘fragmentation of global law’ (Fischer-Lescano/ Teubner 2006), while others empirically identify vertical and horizontal networks of judges that construct the global legal system by interacting with each other in a mutually reinforcing manner

(Slaughter 2004). Obviously, these findings stand in sharp contradiction to each other. Nevertheless, they show the demand for systematic analysis of the inter-institutional influence, various legal orders on international level and their dispute settlement mechanisms on each other. So far, this has been hampered by the point of view from which political scientists have been analyzing cooperation within international institutions.

For decades, international institutions have been studied as separate entities which were launched by interested actors to realize common interests in a delimited issue-area and exist in isolation from each other (cf. Haas 1993 et al.; Miles et al. 2002; Rittberger 1993). However, international relations in general and international trade governance in particular are characterized by the fact that a multitude of international institutions seek for regulation. This growing 'regime density' (Young 1996) leads almost automatically to the fact that international institutions affect each other in various ways. Therefore, international institutions and their effects can only inadequately be analyzed and understood, if one treats and studies them as entities that exist in isolation from each other. Nevertheless, only since recently it is increasingly recognized that international institutions mutually influence each other, even if they are primarily engaged with the solution of their specific cooperation problems (cf. Alter/ Meunier 2009; Knodt 2007; Raustiala/ Victor 2004). As a result, in the new millennium a new branch of research that studies the phenomenon of institutional interaction emerged within the realm of international relations (cf. Alter/ Meunier 2009; Gehring/ Oberthür 2009). Until now, this research community primarily focused on institutional interaction in international environmental governance (cf. Jacquement/ Caparrós 2002; Oberthür/ Gehring 2006) and the tensious relationship between the WTO and different multilateral environmental agreements (cf. Palmer/ Chaytor/ Werksman 2006; Schoenbaum 1997). Besides, overlapping jurisdictions of human rights institutions and related courts were investigated (Tistounet 2000).

The growing 'regime density' leads not only to the multiplication of treaties on international level, but – in combination with the increasing legalization - also to the multiplication of jurisdictions. In turn, this multiplication of international jurisdictions

causes overlaps and possible conflicts of jurisdictions¹. This is of relevance for international law in general (Kwak/ Marceau 2006: 460), but also for those who are interested in international institutions from the perspective of a political scientist, because this overlapping of jurisdictions together with the thereby triggered behaviour of state- and non-state-actors clearly influences the functioning of international institutions.

International trade governance is dominated in large part by three international institutions. While the WTO is seeking to liberalize and regulate international trade on global level, EU and NAFTA seek to liberalize and regulate international trade on their respective regional level. EU and NAFTA constitute world's largest regional markets. Therefore, the three institutions regulate largely the same issue area with the objective of market-creation – either on regional or on global level. All members of the EU – as well as the EC itself - and all members of NAFTA are concomitantly members of the WTO. Therefore, a state-actor that wants to bring an action against another state-actor has in a multiplicity of cases the possibility either to use the dispute settlement mechanism of the regional institution (EU or NAFTA) or the dispute settlement mechanism of the global institution (WTO). Because of these overlapping memberships and the fact that all of the three mentioned institutions can be claimed to be legalized in the sense that they possess dispute settlement mechanisms which create binding decisions for the conflicting parties², international institutions in international trade governance can influence each other through their dispute settlement mechanisms. Therefore, in the following, it will be analyzed how and with which consequences the dispute settlement mechanisms of EU and WTO and of NAFTA and WTO exert influence on the normative development and effectiveness of the respectively other institution. By addressing this question, the fulfilment of the aforementioned necessary conditions for the 'internationalization of the rule of law' can be evaluated.

Institutional interaction through dispute settlement allows one institution either to affirm or to undermine the jurisdiction of another institution. If we can observe a

¹ Overlaps of jurisdictions can be defined as situations where the same dispute or related aspects of the same dispute could be brought to the Dispute Settlement Systems of two distinct institutions (Kwak/ Marceau 2006: 467).

² Nevertheless, it is more than obvious and shall not be doubted that the EU, NAFTA and the WTO exhibit considerably different degrees of legalization.

mutually affirmative jurisdiction of the dispute settlement mechanisms of two international institutions (synergistic interaction), we can conclude that another necessary condition for the 'internationalization of the rule of law' (consistent decisions concerning the same cases) is fulfilled. If we observe that the dispute settlement mechanisms of two international institutions mutually undermine their jurisdictions (disruptive interaction), we have to conclude at least one of the aforementioned necessary conditions for 'internationalization of the rule of law' in international trade governance is not fulfilled.

3. Analyzing Institutional Interaction with Causal Mechanisms

To justifiably speak of institutional interaction, a causal relationship between the institutions involved has to be demonstrated. In our case, this implies that the dispute settlement mechanism of one institution exerts influence on the normative development (obviously including the normative development of the dispute settlement mechanism) or the effectiveness of another institution. Causation implies that we would not expect the effect to occur in absence of the dispute settlement mechanism of the source institution (King/ Keohane/ Verba 1994: 75-85). Without causal influence, we would merely observe a case of coexistence of two institutions.

A causal relationship between two institutions can be established, if we can observe (1) a source institution and especially their dispute settlement mechanism, from which inter-influence emanates, (2) a target institution and relevant parts of it - especially the dispute settlement mechanism – or the issue-area governed by it that is subject to the influence of the dispute settlement mechanism of the source institution, and (3) an unidirectional pathway that connects both institutions (Gehring /Oberthür 2009: 127).

This conception of institutional interaction does not imply that the inter-institutional influence runs back and forth between the institutions involved. Furthermore, if two institutions mutually influence each other, at least two unidirectional causal mechanisms that operate in the opposite direction have to be at hand. Therefore, complex situations of interaction have to be analytically disaggregated into a suitable number of cases that consist of one single source institution, one single target

institution, and one single causal pathway that connects both (Gehring/ Oberthür 2009: 127).

Before the background of this conception of institutional interaction, causal mechanisms can elucidate, how one institution influences the normative development or the effectiveness of another by opening the 'black box' of the underlying cause-effect relationship (George and Barnett 2005: 135-145). Furthermore, they can identify particular pathways through which influence is transferred from the source institution to the target institution³. To this purpose, Coleman's Macro-Micro-Macro Model of collective social behaviour (Coleman 1990: 1-13) can be used for the systematic analysis of institutional interaction through dispute settlement between NAFTA and WTO and partly for the analysis of institutional interaction that originates from the EU and is targeted on the WTO⁴. Due to the fact that the EC is itself a member of the WTO, we are speaking also of compliance within the WTO itself, when we refer to the effects WTO and EU exert on one another. Nevertheless, both institutions qualify as international institutions defined as 'persistent and connected set of formal and informal rules that prescribe behavioural roles, constrain activity, and shape expectations' (Keohane 1989: 3). Therefore, inter-institutional influence in the mentioned causal sense between EU and WTO clearly constitutes a case of institutional interaction. Nevertheless, it exists a systematic distinction between institutional interaction through dispute settlement that originates from the WTO Dispute Settlement Body and influences the EU compared to institutional interaction through dispute settlement between NAFTA and WTO: Due to the fact that the EC as integral part of the EU is itself a member of the WTO, the EU is directly influenced and bound by decisions of WTO's Dispute Settlement Body. The inter-institutional influence that originates from WTO's Dispute Settlement Body runs directly into the normative development of the EU without prior decisions or behavioural changes of actors on micro-level. Regarding institutional interaction emanating from the European Court of Justice and influencing the WTO, two types of cases have to be

³ Causal mechanisms are conceived of as a set of statements that are logically connected and provide a plausible account of how a given cause creates an observed effect (Schelling 1998). They allow distinguishing between genuine causality and 'spurious correlation'.

⁴ This model acts on the assumption that for the explanation of variance on macro-level it has to be shown, how conditions on macro-level at one point of time influence the behaviour of individual actors (micro-level) and how these patterns of behaviour bring about new conditions on macro-level at a later point of time. Therefore, the model altogether encompasses three mechanisms: A macro-micro-mechanism, a micro-micro-mechanism, and a micro-macro-mechanism (Coleman 1990: 8; Hedström/ Swedberg 1998: 21).

distinguished systematically: In cases where regulations or actions of individual member states of the EU are subject to judicial review by the ECJ, some kind of action on micro-level is necessary for transferring the inter-institutional influence into the WTO as target-institution. In cases where regulations or actions of the EU itself underlie judicial review, the decisions and actions necessary to establish inter-institutional influence remains on (institutional) macro-level, because the decision-making process of the European Union has to deal with the decisions of the European Court of Justice in cases, where the EU itself is accused. Due to the fact that NAFTA itself cannot be sued in front of the Dispute Settlement Body of the WTO, in respective cases decisions or actions of actors on micro-level are necessary to transfer the influence that originates from the WTO into NAFTA.

The main effects of institutional interaction arise in the target institution and can be evaluated against the primary target of governance of this institution. If the effects of institutional interaction support the primary target of governance of the target institution, these effects will create synergy between the institutions involved (Gehring/ Oberthür 2009: 128). Concerning institutional interaction through dispute settlement, this would be the case, if a decision of the dispute settlement mechanism of the source institution supports the primary objective of governance of the target institution. If the effects of institutional interaction (here triggered by the decision of the dispute settlement mechanism of the source institution), contradict the primary objective of governance, they lead to institutional interaction of disruptive character (Gehring/ Oberthür 2009: 128).

Institutional interaction basically can emerge on the three levels of effectiveness of governance institutions (Underdal 2004). If an institution exerts influence on another institution, this influence can extinguish either from their norms and knowledge (output), from their influence on the behaviour of relevant actors (outcome), or from the influence on their ultimate target of governance, for example the liberalisation of international trade (impact).

For the analysis of institutional interaction through dispute settlement, two causal mechanisms are of importance: *Interaction through Commitment* and *Behavioural Interaction*.

Interaction through Commitment rests on the assumption that obligations that emerge out of the source institution (here: as decisions of the dispute settlement mechanism) influence the decision-making process and the normative development of the target institution. For example, the decision of the WTO Dispute Settlement Body regarding the Banana Order of the European Union exerted influence on EU's normative development that could not be expected to occur in the absence of the WTO as source institution of inter-institutional influence. This causal mechanism presupposes at least a partial overlap of the issue-areas and memberships of the institutions involved (Gehring / Oberthür 2009: 136).

The causal mechanism Interaction through Commitment proceeds in the following steps: First, the decision-making process of the source institution, or a particular decision-making body, adopts an obligation that is also relevant for the normative development of the target institution. In cases of institutional interaction through dispute settlement, this obligation always constitutes a decision of the dispute settlement mechanism. Second, this decision commits either one or more members of the target institution or the target institution itself. If inter-institutional influence is transferred on the target institution via members of both institutions (micro-level), some kind of action by these actors is needed to influence the normative development of the target institution. Eventually, these action influences the normative development of the target institution. Therefore, this causal mechanism is located at the output-level of regime effectiveness that encompasses the norms and the knowledge of an international institution (Underdal 2004).

Behavioural Interaction refers to behaviour of actors within the realm of the source institution that influences course and performance of the target institution. Therefore, institutional interaction that follows the causal mechanism Behavioural Interaction does not depend on a decision within the target institution, but on a significant overlap or a functional linkage of the involved issue-areas (Gehring/ Oberthür 2009: 142).

Behavioural Interaction proceeds in the following steps: First, the source institution produces some kind of output that regulates behaviour, for example the dispute settlement mechanism adopts a decision in a given dispute. Thereupon, relevant

actors adjust their behaviour in reaction to this output, for example the indicted actors change or retain the behaviour accused in the dispute. Because of the overlapping memberships these behavioural changes, triggered by the source institution, become relevant for the effectiveness of the target institution and finally affect the target institution's effectiveness (Oberthür/ Gehring 2006: 39-41). Because this causal mechanism gains momentum through the behaviour of actors, it is located at the outcome-level of regime effectiveness (Underdal 2004).

Institutional interaction through dispute settlement can follow either the causal mechanism of Interaction through Commitment or the causal mechanism of Behavioural Interaction in each of the four possible directions of influence. It follows the mechanism Interaction through Commitment, if a decision of the dispute settlement mechanism of the source institution influences the normative development of the target institution. In particular, if this decision is referred to in a decision of the dispute settlement mechanism of the target institution, so that the decision of this dispute settlement could not be expected to have taken its particular form in absence of the dispute settlement mechanism of the source institution.

Institutional interaction through dispute settlement follows the mechanism Behavioural Interaction, if a decision of the dispute settlement mechanism of the source institution triggers behavioural changes on actor-level that are relevant for the effectiveness of the target institution, while their normative development and output – especially the decisions of the dispute settlement mechanism – remain unaffected by this decision.

With the help of these causal mechanisms, it becomes possible to systematically address the question, whether the dispute settlement mechanisms of two international institutions exhibit a mutually affirmative jurisdiction (synergistic interaction), or if the institutions mutually undermine their jurisdictions (disruptive interaction). On the basis of these findings, it is in turn feasible to draw implications regarding the 'internationalization of the rule-of-law' and the fulfilment of the therefore necessary conditions.

The following empirical part of the paper will investigate two cases of institutional interaction through dispute settlement. In contrast to other contributions that seek to explain the determinants of forum shopping regarding dispute settlement mechanisms in international trade governance and therefore rely on disputes that were settled in one forum (Busch 2007), this paper refers to disputes that produced decisions within two dispute settlement mechanisms regarding the question whether these decisions were mutually re-enforcing or mutually disrupting. For this purpose, two disputes that refer to the compatibility of the competition policy of either a state-actor (Softwood Lumber Dispute) or a supra-state actor (Banana Dispute) with the obligations of the treaties these actors have concluded are to be analyzed. These two cases were chosen for analysis, because they show considerable accordance regarding the content of the dispute, as well as considerable variance regarding other criteria. Both disputes refer broadly the same question (compatibility of competition policy in a delimited issue-area with international obligations) and produced decisions before the regional court as well as before the WTO DSM. In contrast, NAFTA and the EU show quite different levels of legalization. While the EU can be claimed to be a highly legalized international institution, NAFTA shows a considerably lower level of legalization with the WTO ranking in between.

4. Institutional Interaction through the Dispute Settlement Mechanisms of EU, NAFTA and WTO

Every agreement between states constitutes similarly effective international law. On this basis, the dispute settlement mechanisms of EU, NAFTA and WTO deal within the same issue area of international trade governance, but on different levels of regulation. Therefore, the clarity of legal obligation is jeopardized to be reduced by multiple sets of legal rules and jurisdiction that regulate international trade governance. Within the realm of international trade, *inter alia* the ECJ and the NAFTA DSM provide for dispute settlement on regional level, while the WTO Dispute Settlement Understanding (DSU) provides for dispute settlement on global level. Because the material law of the three separate international institutions shows considerable convergence (NAFTA even incorporates whole parts of the GATT – sometime with no change), the same regulatory measure may come within the jurisdictional reach of more than one trade regime and may be adjudicated

sequentially or even simultaneously in different regimes. Nevertheless, the WTO dispute settlement system claims to be compulsory and exclusive. Article 23 of the WTO DSU is a specific treaty clause that seems to prevent other jurisdictions from adjudicating WTO law violations. However, Article 23 DSU cannot prohibit tribunals established by other treaties from exercising jurisdiction over the claims arising from their treaty provisions that run parallel or overlap with WTO provisions. This is due to the fact that the WTO approves regional trade agreements under Article XXIV GATT and Article V and V^{bis} GATS and thereby takes into account that they may create dispute settlement mechanisms on their own (Kwak/ Marceau 2006)⁵. Therefore, it has to be concluded that there is no clear and indisputable rule regarding the relationship between the WTO jurisdiction and other jurisdictions (Kwak/ Marceau 2006), which leads inter alia to the possibility of vindicating violations of one treaty by reference to another treaty (Frank 1990: 67-83).

Although there is no clear and indisputable rule regarding the relationship between the jurisdictions of the three named institutions, there are some basic guidelines regarding the accessibility of the respective dispute settlement mechanism for state-actors: NAFTA provides for a Forum Election Clause by stating that disputes regarding any matter arising under the NAFTA-Agreement and the WTO-Agreement may be settled in either forum at the discretion of the complaining party (Art. 2005 (1) NAFTA). An exception is made in respect to claims involving environmental, SPS, and technical standard matters, for which the responding party may demand that the matter be settled by a NAFTA panel (Art. 2005 (3) und (4) NAFTA). Once dispute settlement procedures either in NAFTA or in the WTO have been initiated, the procedure initiated shall be used to the exclusion of any other (Art. 2005 (6) NAFTA). Nevertheless, multiple findings do happen, as will be elaborated regarding the dispute between the U.S. and Canada concerning softwood lumber in this paper⁶. There is nothing to stop a state that is dissatisfied with a particular decision of a panel according to Chapter 19 NAFTA and wants to file a suit in another forum, notably within the WTO (De Mestral 2006: 370). Even if it may not be practical or useful for a

⁵ Nevertheless, in reviewing CUSFTA (the predecessor of NAFTA), a GATT Working Group asked the representatives of the United States and Canada regarding the proposed Dispute Settlement Mechanism what would happen „if the conclusions of bilateral dispute settlement procedures .. and those reached under the multilateral dispute settlement procedure were different or even contradictory.“ (Busch 2007:738).

⁶Further cases with multiple findings do exist, for example the case *Canada-Agricultural Products*, a dispute between the USA and Canada.

NAFTA-party to duplicate in the WTO a dispute that should be handled in NAFTA, there is no legal impediment against such a possibility, since, legally speaking, NAFTA and WTO panels would be considering different “matters” under different “applicable law”, providing for different remedies and offering a different implementation and retaliation measures (Kwack/ Marceau 2006: 478).

Regarding the relationship between the EU and the WTO, the situation is different: According to the case law of the European Court of Justice, an international agreement that has entered into force and that has been ‘properly’ concluded by the EC is as such basically part of the EC law (Bourgeois 2000: 93). However, the ECJ avoided devoting this status also to the GATT-agreement, what may be due to the fact that the EC was not a contracting party to GATT 1947. In relation to WTO Agreements, the ECJ also avoided this qualification (Bourgeois 2000: 103).

When dispute settlement mechanisms of two international institutions are triggered in sequence or even in parallel, two kinds of problems *may* emerge: One the one hand, each of the two dispute settlement mechanism may claim supreme jurisdiction over the matter. One the other hand, the two dispute settlement mechanisms may reach different, or even contradictory, results (Kwak/ Marceau 2006: 473). The following two cases-studies seek to explore whether these kinds of problems arise in the relationship between the jurisdictions of EU, NAFTA, and WTO and thereby addresses the question, how and with which consequences the dispute settlement mechanisms of the EU and the WTO as well as the dispute settlement mechanisms of NAFTA and the WTO influence the normative development or effectiveness of the respectively other institution. This will be done before the understanding that it is the basic task of jurisdiction to come to binding decisions and to establish the legal peace through dispute settlement in order to secure the rule-of-law.

4.1 Institutional Interaction through Dispute Settlement between EU and WTO: The Banana Dispute

In the following, it will be shown that the Banana dispute triggered inter-institutional influence that was carried out by the dispute settlement mechanisms of the EU and the WTO. It is argued that the inter-institutional influence that extinguishes from the

WTO dispute settlement mechanism and is directed at the European Union follows the causal mechanism Interaction through Commitment and yields disruptive effects for the institutions involved. Contrary, the inter-institutional influence that emanates from the dispute settlement mechanism of the European Union and is targeted on the World Trade Organization follows the causal mechanism Behavioural Interactions and produces disruptive effects, too.

In 1993, the European Union enacted their Banana order. This order triggered an unexampled deluge of lawsuits in front of a variety of courts. The banana dispute unfolded between the European Court of Justice, the WTO-dispute settlement mechanism (WTO Panel as well as Appellate Body) and also the German constitutional court. Therefore, it exemplifies the complex interlocking structure in international trade law and the possibility of the therein existing dispute settlement mechanisms to exert inter-institutional influence (Weiler 2000: 3).

The regulation establishing the Banana order lead to the subsidisation of bananas from the European Union and conferred preferential access for bananas from ACP-countries⁷ while introducing for all other imports a constant tariff quota, whose exceedance was panelised by a weight-tariff that, because of its height, came close to an import ban. Therefore, several complainants claimed that EU's banana order ran counter to the WTO-rules because it allowed for preferential access for some banana imports.

4.1.1 The Banana dispute before the WTO Dispute Settlement Body

Even before entering into force, EU's banana order was for the first time contested already under the old GATT-dispute settlement mechanism (Alter/ Meunier 2006: 368). After the establishment of the WTO, it was complained that the EC's regime for importation, sale and distribution of bananas is inconsistent with Articles I, II, III, X, XI and XIII GATT as well as provisions of the Import Licensing Agreement, the Agreement on Agriculture the GATS and the TRIMs Agreement. This anew proceedings lead to four panel reports. Therein, considerable infringements of GATT as well as GATS were asserted. After the European Community unsuccessfully

⁷ The ACP-countries are a group of African, Caribbean and Pacific countries that signed the Lomé Convention with the European Union.

invoked the WTO Appellate Body, the banana order was subject to a reform in July 1998. Nevertheless, compliance-reports again detected infringements of GATT⁸. Eventually, after the United States and Ecuador filed an application, the WTO DSB authorised counter measures amounting to 200 Million US-Dollar each. This decision led to a further reform of EU's banana order, but not to the final settlement of the dispute within the dispute settlement mechanism of the WTO. In 2007, Ecuador as well as the United States respectively requested the establishment of new compliance panels. It was considered that the EC has failed to bring its import regime for bananas in accordance with its WTO obligations and the regime remains inconsistent. Eventually, the Appellate Body, invoked by the EC, upheld the findings of the panels that the EC bananas import regime, in particular, its duty-free tariff quota reversed for ACP countries, was inconsistent with Article XIII:1 and Article XIII:2 GATT.

These empirical findings lead to the conclusion that the dispute settlement mechanism of the WTO clearly influenced the EU by committing it to take actions that bring the banana order in consistence with the WTO-law. The WTO DSM clearly influenced the normative development and the output of the EU regarding their Banana order. As already mentioned, the Banana dispute was also arbitrated in front of the European Court of Justice.

4.1.2 The Banana dispute before the European Court of Justice

After the first litigation concerning the Banana order in front of the European Court of Justice was also conducted during GATT 1947⁹, the *Atlanta-case* constituted the first episode of the Banana dispute in front of the dispute settlement mechanism of the EU¹⁰ after the WTO was created. Therein, an importer of bananas sued for compensation for the damages he had to sustain because of the Banana order and drew this claim on the Banana order's inconsistency with GATT-rules. In his decision, the court inferred from the absent direct applicability of WTO-law on the disregard of WTO DSB decisions within the European Union¹¹.

⁸ In December 1998, Ecuador requested the re-establishment of the original panel to examine whether the EC measures to implement the recommendations of the DSB are in accordance with the WTO-law.

⁹ The European Court of Justice refused an action of nullity from Germany.

¹⁰ This time, the Court of First Instance paid attention to the topic.

¹¹ ECJ, Decision 14.10.1999, Rs. C-104/97 P, Slg. 1999, S. I-6983 ff. and assertive

When the European Court of Justice was again asked by a court of a member state, whether a provision of the Banana order infringes the GATT-agreement and whether individuals can rely on this infringement, the European Court of Justice confirmed his dismissive jurisdiction, without even mentioning the decisions of WTO's dispute settlement mechanism (Panel as well as Appellate Body). Especially striking and instructive is the fact that the European Court of Justice enacts this ruling even without oral proceedings, which is only possible in cases of stationary jurisprudence of clarified legal questions (Sauer 2008: 245).

By rejecting the argumentation of the Court of First Instance that from the absence of direct applicability of WTO-law one can infer on the disregard of WTO DSB decisions within the European Union, in the *Biret-case* the European Court of Justice somehow disavowed from his earlier decisions regarding the relevance of WTO DSB decisions, however without answering the pending question in the concrete case.

Eventually, the *van Parys-case*¹² constitutes the last point with respect to the jurisprudence of the European Court of Justice in view of the WTO and its dispute settlement mechanism. In this case, within a preliminary ruling procedure a Belgian court brought several questions to the European Court of Justice. It asked whether the Banana order is compatible with WTO-law, whether it constitutes an infringement that the European Commission does not comply with its obligations arising out of GATT, abuses legal proceedings and does not pay attention to decisions of international accepted dispute settlement mechanisms. Thereupon, the European Court of Justice addressed the question whether individuals can resort to WTO-law in cases, where a legal act of the European Community is unlawful according to a decision of the WTO Dispute Settlement Body. The European Court of Justice neglects this possibility by referring to negotiating leverage and the principle of reciprocity (Sauer 2008: 247).

As a result, provisions of the EC can not be claimed to be inconsistent with WTO-law in front of the European Court of Justice - even in cases where the WTO Dispute Settlement Body has asserted that these provisions infringe WTO-law. Therefore, it

¹² The underlying case is a Belgian litigation, conducted by a fruit importer because of the grant of import licenses for bananas from Ecuador and Panama.

has to be concluded that the European Court of Justice strictly declines to pay attention to the decisions of the WTO Dispute Settlement Body that refer to the European Community (Sauer 2008: 248). As a result, the ECJ adjudges itself a ruling-competence that contradicts that of the WTO DSB, because the EC is itself a member of the WTO.

Which consequences arise out of this non-observance of WTO-law and decisions of the WTO Dispute Settlement Body by the European Court of Justice? At first, decisions of the European Court of Justice that do not pay attention to WTO-law and the decisions of the WTO DSB ignore this kind of law and the decisions based upon it. They may even undermine these decisions and array the opposite. The abusive examination according to WTO-law may appear as a confirmation of the compatibility with it. If the European Court of Justice affirms a legal act of the European Community that infringes WTO-law according to the WTO-dispute settlement mechanism, the member states as well as the institutions of the EU are committed to further execute this legal act. If the decision of the WTO-dispute settlement mechanism commits the member-states to annul this legal ruling, the member states are in the situation of automatically infringing one of the two commitments (Sauer 2008: 248).

To conclude, the empirical findings concerning institutional interaction through dispute settlement originating from the European Court of Justice and targeted on the WTO reveal that this kind of influence rests on the causal mechanism Behavioural Interaction. The ECJ justifies behaviour that actually or potentially runs counter to the obligations of the WTO. Due to the fact that the normative development of the WTO is not affected, this kind of inter-institutional influence is located at the outcome-level.

4.2 Institutional Interaction through Dispute Settlement between NAFTA and WTO: The Softwood Lumber Dispute

This section shows that institutional interaction through dispute settlement in the softwood lumber dispute rests on the causal mechanism Behavioural Interaction. The fact that the dispute settlement mechanisms of NAFTA and WTO were concerned with the same topic in the end led to mutually inconsistent decisions of the two fora

that hampered the effectiveness of the WTO. Therefore, also this case of institutional interaction through dispute settlement possesses a disruptive character.

An important point of contact between NAFTA dispute settlement and the law governing the WTO DSU is the substantive law applicable. Virtually every chapter of NAFTA asserts the compatibility of the agreement with the law of the WTO. In the same vein, NAFTA is replete with interpretative provisions requiring interpretations of words and concepts in a manner compatible with the law of the GATT 1947 and successor agreements, unless the contrary is required (De Mestral 2006: 361).

Like the Banana dispute, also the Softwood Lumber Dispute between the United States and Canada is an enduring trade dispute that was extensively litigated within the dispute settlement procedures of both the NAFTA and the WTO. Therefore, it also exemplifies the complex interlocking structure in international trade law and the possibility of the therein existing dispute settlement mechanisms to exert inter-institutional influence.

The Softwood Lumber dispute can be traced back to the year 1982. Quite contrary to the Banana dispute¹³, it is economically significant for the United States and Canada. The core of the dispute has not changed since its beginning. It is the claim that the Canadian lumber industry is subsidized in an unfairly manner by the Canadian federal government as well as several Canadian provincial governments. The background of this claim is that provincial governments own most of the Canadian timber. It follows that the *stumpage fee*, the price to harvest the timber, is set administratively. Contrary, in the United States this price is often set through a competitive auction. Therefore, it is the claim of the United States that this provision of government-timber below market prices represents a specific and therefore unfair subsidy. U.S. trade remedy law requires that a subsidy has to be specific to a particular industry in order to be countervailable. Contrary to the accusation of the U.S., the Canadian side disagrees with the U.S. claim that the various Canadian governments provide for a specific subsidisation of the their lumber industry by stating that timber is provided to a multitude of industries which makes it not possible to be considered a *specific subsidy* according to U.S. law.

¹³ Neither the EU nor the US have significant banana industries.

After the *Softwood Lumber Agreement*¹⁴ between the United States and Canada expired in 2001¹⁵, the lumber industry in the United States requested the Department of Commerce to charge countervailing duties. Supplementary, the U.S. lumber industry also filed a new claim concerning anti-dumping by claiming that Canadian lumber companies are also involved in unfair price discrimination. The U.S. Department of Commerce determined a combined Countervailing Duty/ Anti-Dumping rate of 27.22% in April 2002. Canada responded to the duties by launching several trade challenges. Within the WTO and within NAFTA, Canada requested separate panels to examine all three determinations made by the US Department of Commerce, namely that Canadian softwood lumber exports are unfairly subsidized, that these subsidies pose a threat of injury to the US market and, that Canadian lumber firms are “dumping” softwood lumber onto the US market.

In July 2003, the ruling of a NAFTA panel established according to Chapter 19 resulted in support of the US anti-dumping duties, but also ruled that the method used by the U.S. Department of Commerce to calculate the duties was flawed. Similarly, a further NAFTA-panel according to Chapter 19 decided that the Canadian softwood lumber industry was in effect being subsidized, but – again - that the method the US used to determine the level of subsidy was flawed what resulted in excessively high duties. Despite these findings, a subsequent NAFTA panel ruled that the US had not provided sufficient evidence to show that domestic softwood lumber producers were threatened with injury from Canadian softwood lumber imports. After similar findings by subsequent panels, the US requested an Extraordinary Challenge Committee under NAFTA Chapter 19 to review the issue. In August 2005, this Extraordinary Challenge Committee (ECC) affirmed the original decision. This was of great importance, because countervailing and anti-dumping duties can only be imposed if the dumped or subsidized imports are deemed to cause a threat of injury to the domestic industry. The panels established according to the WTO DSU mostly made rulings similar to those of the NAFTA panels. However, in August 2005, the WTO reversed itself on an earlier decision, concluding that

¹⁴ The Softwood Lumber Agreement (1996-2001) limited the Canadian lumber exports to the United States to 34.7 million cubic meters. After the expiration of this agreement in April 2001, the two countries did not succeed in adopting a follow-up agreement.

¹⁵ Also in the period before 1982 and 2001, several lawsuits were conducted but remain out of the analysis, because NAFTA entered into force not until 1994.

Canadian softwood lumber imports *did* constitute a threat of injury to the US market. Contrary, in March 2006, a NAFTA panel ruled in Canada's favour, finding that the Canadian stumpage program *did not* constitute a subsidy of softwood lumber exports. By this time, the total duties collected by the US had reached \$5.3 billion.

Therefore, in the end we can observe to inconsistent rulings regarding the determination made by the US Department of Commerce that Canadian subsidies pose a threat of injury to the US market (Pauwelyn 2006): NAFTA's finding is in favour of Canada, indicating that there is no threat of material injury for U.S. firms, hence no right for the U.S. to impose either antidumping or countervailing duties¹⁶. To the contrary, the WTO panel by accepting a US finding that Canadian imports of softwood lumber threaten to cause material injury to U.S. competitors¹⁷. Eventually, a tentative deal was reached between the two nations, in which Canada got \$4 billion of the \$5.3 billion it lost because of the penalties with no additional tariffs to be imposed, leading to a new Softwood Lumber Agreement (SLA) signed on 12 September 2006 in Ottawa.

Although the dispute settlement mechanisms of NAFTA and the WTO worked in accordance most of the time, the fact that legal claims were disputed in two different fora in the end nevertheless led to inconsistent decisions that exemplify the risks of having multiple dispute settlement mechanisms with overlapping jurisdictions on international level.

The Softwood Lumber case follows the causal mechanism Behavioural Interaction: The dispute settlement mechanism of NAFTA as the source institution of inter-institutional influence produces a decision that is inconsistent with a prior decision of the WTO dispute settlement mechanism. As such it is relevant for the WTO's system-specific view on the world according to its ultimate target of governance. This leads to actions on micro level, namely to the tentative deal between Canada and the United States which stated that Canada received \$4 Billion from the U.S, although the WTO dispute settlement mechanism had previously accepted a US finding that Canadian imports of softwood lumber threaten to cause material injury to U.S. competitors.

¹⁶ Opinion and Order of the Extraordinary Challenge Committee, In the Matter of Certain Softwood Lumber Products from Canada, ECC-2004-1904-01 USA.

¹⁷ WTO Panel Report, United States – Investigation of the International Commission in Softwood Lumber from Canada, Recourse to Article 21.5 of the DSU by Canada, WT/DS277/RW.

Because of this WTO-ruling, the payments between the U.S. and Canada undermine the effectiveness of the WTO and especially the effectiveness of the WTO's dispute settlement mechanism. Therefore, we can speak of disruptive interaction. This kind of disruptive interaction could not be expected to occur in absence of NAFTA and its dispute settlement mechanism as the source of inter-institutional influence.

5. Conclusion

This paper showed that EU's, NAFTA's, and WTO's dispute settlement mechanisms exert inter-institutional influence through the causal mechanisms Interaction through Commitment and Behavioural Interaction. It becomes clear that judges do not only serve to 'complete incomplete contracts'. They may likewise serve to segregate, but potentially also to reconcile different treaties on international level.

The two cases of institutional interaction through dispute settlement studied here reveal the danger of mutually disrupting decisions that undermine the normative development of effectiveness of the respectively other institution. Due to the absence of an international sequence of courts, a consistent legal order in specific areas of international governance is only possible, if the different dispute settlement mechanisms operating in the specific area of governance pay attention to each others' rulings and exert 'judicial comity' (Slaughter) instead of 'judicial protectionism' (Petersmann).

Although this paper studied only two cases of institutional interaction through dispute settlement, parallel or successive dispute settlement proceedings challenging the same measure (e.g. antidumping duties, countervailing duties, safeguard measures, import restrictions) in the WTO dispute settlement proceedings and in regional courts or court-like bodies have become frequent in international trade relations (Petersmann 2004: 6/7; Shany 2003: 53-59) and deserve further examination.

Regarding the claim that the rule-of-law is already internationalized in international trade governance in the OECD-world (Zangl 2006), this paper suggests to pay attention to the effects of institutional interaction through dispute settlement. The aim of every legal order is to create legal peace through binding and consistent decisions by its dispute settlement mechanisms. Therefore, this paper argued in the

introduction that one cannot speak of the internationalization of the rule of law, if the dispute settlement mechanisms of international institutions in the same policy field do contradict each others' rulings and if a dispute settlement mechanism adjudges itself a ruling-competence that contradicts with that of another dispute settlement mechanism. In the light of the empirical findings, it seems to be appropriate to relativize the claim of an international rule of law in international trade governance and to investigate the increasing legalization of international cooperation through the lens of institutional interaction. Although it is perfectly clear that the empirical findings of this paper regarding institutional interaction through dispute settlement are only very preliminary and limited, the paper showed the necessity for political scientists to analyze legalization of international relations through the lens of institutional interaction.

By analysing far more of these cases, it becomes possible to gain a picture of the broader structure of the inter-institutional effects that are triggered by dispute settlement mechanisms and to address the question whether an ordering principle that leads to a functional division of work between the dispute settlement mechanisms is emerging. It can be argued that competition over regulatory dominance is the single most important driver for broader structures, since member states will rarely support lasting conflict among institutions nor will they themselves be interested in the continuity of the conflict. On this basis, it can be hypothesized that in a competitive environment, institutions dispute settlement mechanisms will react by specialization, seeking to monopolize certain functions, while leaving other functions to other dispute settlement mechanisms. This would constitute a novel form of systemic ordering principle beyond the institutions involved and, in the end, to legal certainty as cornerstone of every 'rule of law'.

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